Formis Media Teknologi Sdn Bhd v Ariniz Broadcasting Image (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D2–28–324 OF 1998
ABDUL AZIZ J
13 JANUARY 1999

Sale of Goods *— Unpaid seller — Goods sold and delivered — Goods repossessed, resent and repossessed — Whether lien arises*

The respondents sought to have the winding-up petition struck out. The petition was based on a statutory demand for RM17,968 being the amount allegedly due and owing to the petitioners for goods sold and delivered and services rendered at the respondents' request. The undisputed facts were that the petitioners sold, on 23 October 1997, two items to the respondents to be installed on the latter's 'Avid System' with a credit sale of 30 days. The respondents failed to pay and the petitioners repossessed the items with the former's consent on 2 March 1998. On 19 March 1998, the petitioners received a cheque for the payment and reinstalled the two items on the respondents' system. The petitioners were also to 'fix and troubleshoot' the Avid System on that day but were unable to do so because the system was blocked by another system belonging to the respondents. They offered to do the work on 23 March 1998 but the respondents refused without reason and informed the bank to stop payment on the cheque. The petitioners took back the two items at the respondents' request and served the statutory demand. The respondents claimed that they were not a debtor because there was no money owing since the petitioners had taken back the goods. The petitioners claimed that the title of the goods had passed to the respondents and the taking back of the goods was an exercise of their right to an unpaid seller's lien and the exercise of that right did not extinguish the debt which was still owing.

Held, striking out the petition with costs:

Once an unpaid seller delivers the goods to the buyer, he loses his lien on the goods. The petitioners had delivered the goods to the respondents and the provisions of ss 46(1)(a) and 49(1)(a) of Sale of Goods Act 1957, read together, do not envisage a lien to be created again should for some reason the unpaid seller come into possession of the goods again. The unpaid seller must not deliver the goods if he wants to claim the lien. Once he has delivered the goods, he loses his lien once and for all (see p 364H–I).

[Bahasa Malaysia summary

Penentang telah meminta supaya petisyen penggulungan dibatalkan. Petisyen tersebut adalah berdasarkan kepada tuntutan statutori sebanyak RM17,968 iaitu jumlah yang didakwa tertunggak dan

terhutang kepada pempetisyen bagi barang-barang yang telah dijual dan dihantar dan perkhidmatan yang telah diberi atas permohonan penentang. Fakta-fakta yang tidak dipertikaikan adalah bahawa pempetisyen telah menjual, pada 23 Oktober 1997, dua barang kepada penentang untuk dipasang kepada 'Avid System' kepunyaan penentang dengan jualan kredit selama 30 hari. Penentang telah gagal untuk membayar dan pempetisyen telah mengambil semula barang-barang tersebut dengan kebenaran penentang pada 2 Mac 1998. Pada 19 Mac 1998, pempetisyen telah menerima sekeping cek bagi pembayaran tersebut dan telah memasang semula kedua-kedua barangan tersebut kepada sistem penentang. Pempetisyen juga sepatutnya membetulkan dan menyelesaikan masalah Avid System penentang tetapi tidak dapat berbuat demikian pada hari yang sama kerana sistem tersebut telah dihadang oleh sebuah lagi sistem kepunyaan penentang. Pempetisyen telah menawarkan untuk melakukannya pada 23 Mac 1998 tetapi penentang menolak tanpa sebab dan telah mengarahkan pihak bank supaya menghentikan pembayaran cek. Pempetisyen mengambil semula kedua-dua barangan tersebut atas permintaan penentang dan seterusnya menghantar tuntutan statutori. Penentang mendakwa bahawa mereka bukanlah penghutang kerana tiada wang yang terhutang oleh kerana pempetisyen telah mengambil semula barangan tersebut. Pempetisyen mendakwa bahawa hakmilik barangan tersbut telah berpindah kepada penentang dan pengambilan semula barangan tersebut adalah untuk melaksanakan hak lien mereka sebagai penjual yang tidak dibayar dan perlaksanaan hak tersebut tidak menghapuskan hutang yang masih tertunggak.

Diputuskan, membatalkan petisyen dengan kos:

Apabila penjual menghantar barang kepada pembeli, beliau kehilangan lien ke atas barangan tersebut. Pempetisyen telah menghantar barangan tersebut kepada penentang dan peruntukan ss 46(1)(a) dan 49(1)(a) Akta Jualan Barangan 1957, bila dibaca bersama, tidak membayangkan lien dicipta semula jika untuk sebab tertentu penjual yang tidak dibayar mendapat semula barangan tersebut. Penjual yang tidak dibayar tidak mesti menghantar barangan tersebut jika beliau mahu menuntut lien. Apabila beliau menghantar barangan tersebut, maka beliau kehilangan lien itu buat selamanya (lihat ms 364H–I).]

Notes

For cases on goods sold and delivered, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 761–762.

Legislation referred to

Sale of Goods Act 1957 ss 20, 46(1)(a), 49(1)(a), (2)

HS Tan (Mah-Kamariyah & Partners) for the petitioners.
Alex de Silva (SG Lingam & Co) for the respondents.

Cur Adv Vult

Abdul Aziz J: The respondents seek to have the winding-up petition here struck out. The petition is based on a statutory demand for RM17,968, being the amount allegedly due and owing to the petitioners for goods sold and delivered and services rendered at the respondents' request. The respondents say there was no money due to the petitioners from them.

The facts are hardly in dispute. They are as follows.

The respondents had what is called an 'Avid System'. On 8 August 1997 the petitioners serviced and troubleshot the system. The charge was RM600. From what the petitioners discovered in the course of the servicing and troubleshooting, they recommended to the respondents that the expansion chassis and the audio media boardset of the respondents' Avid System be replaced. The cost of the two items was RM17,368. The respondents agreed and on 23 October 1997 the two items were bought by the respondents and installed by the petitioners in the Avid System. It was a credit sale with a 30-day credit. The respondents would therefore be indebted to the petitioners for RM17,968 on 23 November 1997.

The respondents however failed to pay despite repeated requests and despite the petitioners' extending the time until 23 February 1998. So on 20 February 1998 the petitioners wrote to say they had no alternative but to repossess the two items. The respondents responded by saying that payment would be made by 25 February.

No payment being received, on 2 March 1998 the petitioners repossessed the two items with the respondents' consent.

On 19 March 1998 the petitioners received a cheque from the respondents for RM17,968. The cheque was dated 28 February 1998, before the repossession. So next day, Friday 20 March 1998, the petitioners reinstalled the two items in the respondents' Avid System.

Apparently, with the reinstallation, the petitioners were also to 'fix and troubleshoot' the Avid System due to a fault which had already existed on 18 February 1998, but they were not able to do so on 20 March 1998 itself because there was an editing system belonging to the respondents which physically blocked their Avid System, rendering servicing and troubleshooting of the Avid System impossible. The petitioners offered to do the work on Monday 23 March. The respondents refused the arrangement without reason and on the same day, 20 March, they informed the bank to stop payment on the cheque. The petitioners say the respondents acted unreasonably and I tend to agree.

On 24 March 1998, at the respondents' request, the petitioners collected back the two items. They say they did so because they were of the view that otherwise the items would not be cared for and might get damaged and they would be willing to install them back once payment was made.

No payment having been made, the petitioners served the statutory demand for RM17,968.

The respondents claim they were not owing any money, and therefore were not a debtor, because the petitioners had taken back the goods. The petitioners say that the title to the goods had passed to the respondents and they had taken back the goods in exercise of their right to an unpaid seller' s lien and that the exercise of that right did not extinguish the debt, which, therefore, was still owing.

It seems clear to me on the facts that before the second taking back of the two items on 24 March, and even before the first on 2 March, the sale of the two items had been completed and property in the goods had passed to the respondents. See s 20 of the Sale of Goods Act 1957. When the petitioners took the goods on 24 March, the goods belonged to the respondents and the respondents were owing the petitioners RM17,968.

The respondents have paid the RM600 service fee after the petition was presented, leaving the price of the two items, RM17,368, still unpaid.

The question to be decided is whether the petitioners had a lien on the goods when they issued the statutory notice. If they had a lien on the goods, they were entitled to demand payment of the price. Subsection (2) of s 49 of the Sale of Goods Act 1957 clearly implies that an unpaid seller having a lien on the goods has a right to sue for the price. It says:

> The unpaid seller of goods having a lien thereon, does not lose his lien by reason only that he has a decree for the price of the goods.

But if the petitioners had no lien on the goods, then they had no right, while retaining the respondents' goods, to demand the price of the goods. Or to put it another way, the respondents would be justified in disputing the debt and claiming that they are not indebted to the petitioners in the sum of RM17,968. The petitioners would not be entitled to say that they are retaining the goods solely for safekeeping for the benefit of the respondents at the respondents' request because it is clear from para 13 of their affidavit dated 10 August 1998 that they would not return the goods until the price is paid.

Section 46(1)(a) of the Act, on which the petitioners rely, provides that the unpaid seller of goods, notwithstanding that the property in the goods may be passed to the buyer, has a lien on the goods for the price 'while he is in possession of them'. But s 49(1)(a) provides that the lien is lost when the unpaid seller 'delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods'. Reading the two provisions together, I gain the understanding that once an unpaid seller delivers the goods to the buyer, he loses his lien on the goods. In the present case no lien could arise because, upon the sale on 23 October 1997, the petitioners had delivered the goods to the respondents. The two provisions, read together, do not envisage a lien to be created again should for some reason the unpaid seller come into possession of the goods again. If he wants to claim a lien, he must not deliver the goods in the first place. Once he has delivered the goods he loses his lien once and for all. *Chitty on Contracts* (27th Ed) Vol II, at pp 1228 and 1229, says: 'The

A seller's lien is not lost by the buyer's wrongful taking of the goods, but once the lien is lost by delivery to the buyer or his agent, it does not revive when the goods are handed back to the seller for a different purpose (eg repacking)'.

For that reason, the petitioners fail in their reliance on the unpaid seller's lien and the respondents are justified in disputing the debt.

B

I strike out the petition with costs.

Petition struck out with costs.

Reported by Zahid Taib

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